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The Conservative Project to ‘Break the Link between British Courts and Strasbourg’: Rhetoric or Reality?

Helen Fenwick and Roger Masterman*

The current Conservative government has pledged to repeal the Human Rights Act and introduce a British Bill of Rights, with the specific aim of ‘breaking the link’ created by s.2 of the Human Rights Act between the domestic courts and Strasbourg. On the reasonable assumption that the Bill of Rights will include a new version of s.2 HRA, reflecting that pledge, this article will examine the implications of this proposal, beginning by exploring the nature of the current ‘link’ between the British courts and Strasbourg in s.2 HRA, and considering the extent to which that link has *already* been significantly weakened. Taking that weakening into account, it will go on to consider the basis for the Conservative proposal, and the options available to the Conservatives in breaking that link in a BBoR, taking account of the introduction of limitation clauses in a BBoR and of the possibility of according Strasbourg judgments against the UK an advisory status only. Finally, taking account the European Court’s recent movement towards ‘enhanced’ subsidiarity, it will examine the possible beneficial or negative consequences for the protection of human rights in Britain of reliance on a BBoR intended to be interpreted and applied independently of Strasbourg influence.

Key words: British Bill of Rights, Human Rights Act, European Court of Human Rights.

INTRODUCTION

In the febrile aftermath of the June 2016 ‘Brexit’ referendum, and of the decision of the UK Supreme Court that Parliament must vote to trigger Article 50 of the Treaty of Lisbon,¹ the

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commitment of the Conservative Government to replace the Human Rights Act (HRA) with a British Bill of Rights (BBoR) has been somewhat overshadowed. However, that commitment gains considerably in significance as a result of ‘Brexit’ since, once the UK has withdrawn from the EU, it can be presumed that the EU Fundamental Charter of Rights will no longer be applicable in domestic law² and the potential for the UK’s human rights framework to undergo significant further amendment will be considerable. The Government’s determination to repeal the HRA was reaffirmed in the 2016 Queen’s Speech and, while a draft BBoR has not been published, one aspect of it can be viewed as clearly established: it will reflect long-standing Conservative hostility, not to the text of the ECHR itself, but to its attendant jurisprudence, and in particular to the ‘living instrument’ or ‘living tree’³ approach, which influences domestic law via s.2 HRA. That hostility was reaffirmed by Theresa May during her campaign to become the leader of the Conservative party when she attacked certain Strasbourg decisions in the ‘living instrument’ mode.⁴ It was also reflected in the

¹ *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 WLR 583.

² The Charter has been found to apply directly in domestic law: Cases C/293/12 and C/594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources & Others and Seitlinger and Others* [2015] 1 QB 127; [2014] 3 CMLR 44. See further: House of Lords EU Committee, *The UK, the EU and a British Bill of Rights*, HL Paper 139 (9 May 2016); ‘an inquiry to assess the impact of a Bill of Rights on the UK’s obligations under the EU Charter, and, conversely, of those obligations on a British Bill of Rights’, [6]. See also the recent comment on this matter: ‘Top Lawyers warn of Human Rights Crisis after Brexit’, *The Guardian* 21 February 2017 (available at: <https://www.theguardian.com/law/2017/feb/21/top-lawyers-warn-of-human-rights-crisis-after-brexit>.)

³ In *Brown v Stott* [2003] 1 AC 681, Lord Bingham of Cornhill described the ECHR, at 703, as a ‘living tree capable of growth and expansion within its natural limits’.

⁴ ‘UK must leave the European Convention on Human Rights, says Theresa May’, *The Guardian*, 25 April 2016.

Conservatives' 2015 election manifesto, which included a pledge to abolish the HRA and replace it with a British Bill of Rights that would 'break the formal link between British courts and the European Court of Human Rights,' and render the UK Supreme Court the 'ultimate arbiter of human rights matters in the UK'.⁵

In the wake of the 2015 General Election Prime Minister David Cameron said that plans to repeal the HRA would be published within the first 100 days of the new administration.⁶ Untrammelled by Liberal Democrat Coalition partners, it appeared that the promise made in the 2010 Conservative manifesto would finally be put into practice. The Queen's Speech 2015, however, did not refer to legislation that would effect such repeal, but merely to *proposals* to introduce a BBoR. This commitment was repeated in the 2016 Queen's Speech, and – following the June 2016 in/out referendum on EU membership and David Cameron's replacement by Theresa May – the new Secretary of State for Justice and Lord Chancellor again reiterated the Government's intention to replace the HRA with a BBoR.⁷ The draft Bill of Rights will not, however, be published until after completion of the 'Brexit' negotiations.⁸

The 2014 Conservative Party document, *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws*, proposed that the 'formal requirement for our Courts to treat the Strasbourg Court as creating legal precedent

⁵ See: *Strong leadership. A clear economic plan. A brighter, more secure future*, available at: <https://www.conservatives.com/manifesto>; The Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* (October 2014), p.6.

⁶ See eg: Oliver Wright, 'Unshackled from coalition partners, Tories get ready to push radical agenda', *The Independent*, 9 May 2015.

⁷ House of Commons Justice Committee, Oral Evidence, The Work of the Secretary of State HC620, 7 September 2016, Q78-Q91.

⁸ HC Debates, Vol.618, Col.355, 8 December 2016 (Jeremy Wright QC MP).

for the UK (sic)’⁹ would be undone under a new BBoR. On the reasonable assumption, therefore, that the BBoR will include a new version of s.2 HRA, reflecting those 2014-16 pledges, this article will examine their implications, beginning by exploring the nature of the current ‘link’ between the British courts and Strasbourg in s.2 HRA, and considering the extent to which that link has *already* been significantly weakened. It will go on to consider the basis for the Conservative proposal, and the options available to the Conservatives in breaking that link in a BBoR, taking account of the introduction of limitation clauses in a BBoR and of the possibility of according judgments against the UK an advisory status only. The relation between those options and the current stance taken by the judiciary to s.2 will be evaluated. Finally, taking account the European Court’s recent movement towards ‘enhanced’ subsidiarity, it will examine the possible beneficial or negative consequences for the protection of human rights in Britain of reliance on a BBoR intended to be interpreted and applied independently of Strasbourg influence. It will take the stance that maintaining governmental accountability via the enforcement of human rights standards is a clear good, but will consider the possibility that an enrichment of rights might arise, enabling *inter alia* such accountability, due to the *diminution* of Strasbourg influence under a BBoR. It is not intended to discuss the matter of changing the relationship between Strasbourg and domestic courts and repeal of the HRA in relation to the devolved institutions since that extremely controversial issue has been side-stepped by the Conservative leadership so far. Similarly, the continued international law obligation placed on the state to abide by final judgments at Strasbourg against it under Article 46 ECHR will form a sub-theme in the article, but raises wider issues that go beyond the scope of this piece.

⁹ The Conservative Party, *Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws* (October 2014), p.5.

THE 'LINK' BETWEEN BRITISH COURTS AND STRASBOURG

Section 2(1) HRA: Creating 'legal precedent[s] for the UK'?¹⁰

As a preliminary, the nature of the 'formal' linkage referred to in the 2015 Manifesto requires unpicking. A precedential link between national courts and the European Court of Human Rights is not a requirement of the Convention; nor is it a requirement of the HRA. Under s.2 HRA, in seeking to interpret the Convention rights under the HRA, the domestic judiciary must merely 'take into account' any relevant Strasbourg jurisprudence; the intention underlying s.2(1) was that the jurisprudence would *not* be viewed as binding.¹¹ The problem from the Conservative perspective stems from the way in which s.2(1) has been interpreted and applied, rather than from its wording. The finding of the House of Lords in *Ullah*,¹² that judges should follow any clear and constant jurisprudence of the Strasbourg Court and should offer domestic protections for the Convention rights which were neither narrower nor more expansive than those afforded at Strasbourg – 'the mirror principle'¹³ – was indicative of an early tendency to treat the Strasbourg jurisprudence as effectively determinative of disputes in the ECHR context arising in the domestic sphere.¹⁴ The sentiments behind such an approach were noted in the UK Supreme Court decision in *Ambrose v Harris* in which Lord

¹⁰ The Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* (October 2014), p.5.

¹¹ See further: F. Klug and H. Wildbore 'Follow or lead? The Human Rights Act and the European Court of Human Rights' [2010] EHRLR 621.

¹² *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323.

¹³ See: J. Lewis, 'The European Ceiling on Human Rights' [2007] PL 720.

¹⁴ R. Masterman, 'Section 2(1) of the Human Rights Act 1998: binding domestic courts to Strasbourg?' [2004] PL 725; R. Masterman, 'Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the "Convention rights" in Domestic Law' in H. Fenwick, G. Phillipson and R. Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2007).

Hope, giving the leading judgment, said that ‘Parliament never intended to give the courts of this country the power to give a more generous scope to those rights than that which was to be found in the jurisprudence of the Strasbourg court. To do so would have the effect of changing them from Convention rights, based on the treaty obligation, into free-standing rights of the court’s own creation.’¹⁵ From that perspective, replication of Strasbourg protections in the domestic context provided certainty and predictability consistently with the intent of Parliament in enacting the HRA.

But such a stance was inevitably unlikely to enhance the dialogic opportunities that exist between Strasbourg and the domestic courts.¹⁶ As Lord Irvine has said: ‘[a] court which subordinates itself to follow another’s rulings cannot enter into a dialogue with its superior in any meaningful sense’.¹⁷ The perception, however, of subordination of domestic courts to Strasbourg judgments as ‘precedents’ that the *Ullah*-based approach engendered was recognised by the Coalition Government-appointed Bill of Rights Commission, which found that a reassertion of the national dimensions of human rights law through the adoption of a UK Bill of Rights could ‘result in greater domestic “ownership” of rights’ and a reduction in the commonly-held perception that rights – as protected under the HRA scheme – are ‘foreign’¹⁸ or a ‘European imposition.’¹⁹ Reporting in 2012, the Commission noted that there was a substantial body of opinion that wanted to emphasise that courts were free to depart from Strasbourg.²⁰ The Commission noted that JUSTICE, for instance, had argued that:

¹⁵ [2011] UKSC 43; [2011] 1 WLR 2435, [19].

¹⁶ Baroness Hale ‘*Argentoratium Locutum*: Is Strasbourg or the Supreme Court Supreme?’ 12(1) HRLR (2012) 65.

¹⁷ Lord Irvine of Lairg, ‘A British Interpretation of Convention Rights’ [2012] PL 237, 247.

¹⁸ Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us* (December 2012), [7.27].

¹⁹ Joint Committee on Human Rights, *A Bill of Rights for the UK?*, HL165-I/HC150-I (August 2008), [94].

²⁰ *Ibid.*, [56] and [57].

Although there is a clear line of case law which suggests our judges consider themselves [bound by the Strasbourg case-law], there is nothing in the HRA which requires this approach ... The judges themselves appear to be moving away from this unduly restrictive approach ... Rightly we consider that the language in the Human Rights Act 1998 strikes an appropriate balance between respect for the boundaries of the Convention and encouragement of the development of independent domestic rights jurisprudence.²¹

But although, as JUSTICE noted, it cannot be said that the judges have confined themselves only to ‘taking account’ of the Strasbourg jurisprudence, the Commission did *not* propose a change to the position under s.2 HRA:

There was also a clear majority in favour of maintaining the requirement in the Human Rights Act on UK courts to ‘take into account’ relevant judgments of the European Court of Human Rights with three quarters of those responding on this issue wanting to maintain the current formulation...[often] on the basis that our courts were now correctly interpreting the Act’s wording in this respect having failed on some occasions to do so in the past.²²

In spite of the Commission’s partial acknowledgement of a subtle refinement of the courts’ approach to the interpretation of s.2(1) of the Act, such jurisprudential developments appear not to have had an impact on the Conservative leadership’s desire to ‘break the link’ between

²¹ Ibid., [56].

²² Ibid., [58].

domestic courts and the European Court of Human Rights. Nor has the dilution of *Ullah* that has recently occurred, the matter to which this article now turns.

A ‘retreat from *Ullah*’?²³

The mirror metaphor has been used to indicate that s.2 HRA requires the domestic courts to replicate Strasbourg’s approach, and therefore to show restraint where the Court has not spoken or not spoken clearly on an issue, since its approach cannot be reflected domestically. Two phases in the approach to the interpretation of s.2 can be identified over the 16 years that the HRA has been in force, moving, broadly speaking, from full adherence to the mirror principle in the early post-HRA period, to partial adherence to that principle.²⁴ Judicial supporters of the ‘full mirror principle’ model cemented in law by *Ullah*²⁵ in 2004 considered that the domestic courts’ judgments should *not* outpace Strasbourg *and* should mirror Strasbourg where it has spoken, with only highly exceptional departure. That ‘mirror’ approach sees domestic courts effectively operating as local proxies for the Strasbourg court.²⁶ It has been espoused by a number of the senior judges, according to their judgments²⁷ and extra-judicial contributions.²⁸ Some, such as Lord Hoffmann in particular, have been at times very reluctant members of this camp, as he made clear in *AF*.²⁹

²³ The phrase is from *Moohan v Lord Advocate* [2014] UKSC 67; [2015] AC 901, [103].

²⁴ The discussion of these phases draws partly on Lord Wilson’s timeline set out in *Moohan*.

²⁵ *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, [20].

²⁶ *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Quark Fishing Ltd* [2005] UKHL 57; [2006] 1 AC 529, [34].

²⁷ See in particular the well-known comment of Lord Rodger in *AF (No.3)*, ‘Strasbourg has spoken, the case is closed’ [2009] UKHL 28; [2010] 2 AC 269, [98].

²⁸ P. Sales, ‘Strasbourg jurisprudence and the Human Rights Act: a response to Lord Irvine’ [2012] PL 253.

²⁹ *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28; [2010] 2 AC 269.

One basis for adopting the full mirror principle was explained in *R (Al-Skeini) v Secretary of State for Defence* by Lord Brown who found that the domestic courts should not outpace Strasbourg because if they were to construe a Convention right ‘too widely’, the UK could not apply to the European Court to have the decision corrected, whereas, ‘in the obverse situation, the aggrieved individual could apply to have it corrected’.³⁰ Baroness Hale has said on this: ‘it is more a question of respect for the balances recently struck by the legislature than a question of the extent of our powers. One reason for this is that an aggrieved complainant can always go to Strasbourg if she disagrees with our assessment, but the United Kingdom cannot’.³¹ Thus she indicated that relying on a full manifestation of the mirror principle would appear to avoid the institutional imbalance that might otherwise occur.

Under this approach domestic judges should adhere to the mirror principle in order to ‘Strasbourg-proof’ the case: if the applicant would probably win at Strasbourg they should win domestically.³² But that argument does not take account of the fact that governments have methods open to them, which victims do not, to seek to influence the interpretation and application of the ECHR, via the European institutions. For example, the UK’s Chairmanship of the Council of Europe allowed it at Brighton in 2012 to seek to increase the margin of appreciation member states enjoy.³³ (In the result, the Preamble of the European Convention on Human Rights (ECHR) will be amended by Protocol No. 15 to the ECHR to add references to the principle of subsidiarity and to the margin of appreciation.) The full ‘mirror’ approach was also quite recently supported by Sales LJ who argued that rule of law principles

³⁰ [2007] UKHL 26; [2008] AC 153, [106]; Baroness Hale agreed, [90].

³¹ Baroness Hale ‘*Argentoratium Locutum*: Is Strasbourg or the Supreme Court Supreme?’ 12(1) HRLR (2012) 65, 72.

³² *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Quark Fishing Ltd* [2005] UKHL 57; [2006] 1 AC 529, [34].

³³ M. Elliott, ‘After Brighton: Between a Rock and a Hard Place’ [2012] PL 619, 621.

of certainty and predictability support its acceptance,³⁴ but his position could be questioned on the basis that the Strasbourg jurisprudence is not always of high enough quality to satisfy such principles, or on the ground that it is declaratory rather than precedential.³⁵

The full ‘mirror’ approach, however, began to give way, after the HRA had been in force for around 7 years, to what might be termed the ‘partial’ or ‘semi-mirror’ approach, under which attempts to reflect Strasbourg authority in domestic law are abandoned in the face of perceived deficiencies in the potentially applicable European jurisprudence. Thus in 2007 Lord Bingham found that Strasbourg had not determined a case closely comparable with the one before the court, and that it would be inappropriate to align that case with the least dissimilar of the Strasbourg cases; instead he said that the task of the court was to seek to give fair effect to Strasbourg principles.³⁶ In a similar vein in 2008 Lord Hope found that the words of the *Ullah* principle were ‘certainly no less’ but *not* ‘certainly no more’, and that the Strasbourg jurisprudence was not to be treated as a straitjacket.³⁷ Adhering to this semi-mirror model are those who consider that the domestic courts’ judgments should (or could) sometimes outpace Strasbourg, but if Strasbourg *has* spoken, they should normally follow suit; departure should be infrequent but is both possible and legitimate. This median approach permits a greater degree of judicial discretion in the application of the Strasbourg case-law, arguably allowing the courts to search for solutions to rights’ questions which cannot be

³⁴ P. Sales ‘Strasbourg jurisprudence and the Human Rights Act: a response to Lord Irvine’ [2012] PL 253.

³⁵ See: R. Masterman, ‘Taking the Strasbourg Jurisprudence into Account: Developing a “Municipal Law of Human Rights” under the Human Rights Act’ (2005) 54 ICLQ 907, 915-917; R. Masterman, ‘Deconstructing the Mirror Principle’ in R. Masterman and I. Leigh (eds), *The United Kingdom’s Statutory Bill of Rights: Constitutional and Comparative Perspectives* (183 *Proceedings of the British Academy*) (Oxford: Oxford University Press, 2013), pp.124-129.

³⁶ *Secretary of State for the Home Department v JJ* [2007] UKHL 45; [2008] AC 385, [19].

³⁷ *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] AC 173, [50].

answered solely by reference to the Strasbourg jurisprudence.³⁸ Again, senior judges have indicated their sympathy with this approach in practice³⁹ and in academic contributions.⁴⁰ In particular, in *Re G*, the House of Lords (by a majority) determined that an outcome not strictly supported by existing Convention jurisprudence could be arrived at if it were ‘likely’ that the Strasbourg court would now come to the same result.⁴¹ More recently, Lord Brown found in 2012 that it would be absurd to wait for Strasbourg to make a decision almost directly in point before finding a violation, and also that the domestic court could carry its law a step further than Strasbourg if so doing would follow naturally from Strasbourg principles.⁴² While in 2014 Lord Kerr suggested that the duty of the court under s.6 HRA not to act incompatibly with a Convention right requires it to determine whether an alleged right exists even where the Strasbourg jurisprudence does not clearly establish its existence.⁴³

³⁸ Cf. *N v Secretary of State for the Home Department* [2005] UKHL 31; [2005] 2 AC 296, [25] (Lord Hope).

³⁹ *Ambrose v Harris* [2011] UKSC 43; [2011] 1 WLR 2435 (Lord Kerr); *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 AC 173, [116]-[123] (Baroness Hale).

⁴⁰ Baroness Hale, ‘*Argentoratium Locutum*: Is Strasbourg or the Supreme Court Supreme?’ (2012) 12(1) HRLR 65.

⁴¹ *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 AC 173, [27], [53], [125], and [143].

⁴² *Rabone v Pennine Care NHS Trust* [2012] UKSC 2; [2012] 2 AC 72, [112].

⁴³ *Surrey County Council v P* [2014] UKSC 19; [2014] AC 896, [86]. See also: [62]. In *R (Keyu and others) v Secretary of State for Foreign and Commonwealth Affairs and another* [2015] UKSC 69; [2016] AC 1355, [98] Lord Neuberger considered the possibility of determining what the Strasbourg would have found in the circumstances and applying it under the HRA but left the question open in the particular context; he said: ‘I would leave open the question whether, if the Strasbourg court would have held that the appellants were entitled to seek an investigation into the killings under article 2, a UK court would have been bound to order an inquiry pursuant to the 1998 Act’.

This approach was reaffirmed as correct recently by Lord Wilson in the minority in the Supreme Court in *Moohan*.⁴⁴ Lord Hodge, in the majority, affirmed the partial mirror principle to the effect that if Strasbourg has spoken clearly, its decisions should be followed: ‘it is consistent with the intention of Parliament in enacting HRA 1998 that our courts should follow a clear and constant line of decisions’ of the Strasbourg Court, ‘whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle’.⁴⁵ Given that the majority in *Moohan* considered that the Strasbourg jurisprudence was clear on the issue at hand, they did not need to decide whether Strasbourg should be outpaced domestically: Strasbourg had clearly indicated, they found, that Article 3 of Protocol 1 did not apply to prisoners voting in a referendum, as opposed to an election (bearing in mind the inability of the Scottish Parliament to legislate contrary to the ECHR), so they did not need to consider whether they themselves – regardless of the Strasbourg stance – could discover a Convention right to vote in such circumstances. Since Lord Wilson considered that the jurisprudence was unclear, he went on to consider whether the *Ullah* principle would disable the court ‘from going significantly further than the ECtHR’ by determining that Article 3 did extend to voting in the Scottish referendum. He reviewed the s.2 jurisprudence under the heading ‘the retreat from the *Ullah* principle’,⁴⁶ and found that ‘where there is no directly relevant decision of the Court with which it would be possible to keep pace we can and must do more. We must determine for ourselves the existence or

⁴⁴ *Moohan v Lord Advocate* [2014] UKSC 67; [2015] AC 901, [105], [106].

⁴⁵ *Ibid*, [13] (citing *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 AC 104, [48]). That approach was reaffirmed in *R (Chester) v Secretary of State for Justice* [2013] UKSC 63; [2014] AC 271, [26] and by Baroness Hale in *R (Keyu and others) v Secretary of State for Foreign and Commonwealth Affairs and another* [2016] UKSC 69; [2016] AC 1355, [291].

⁴⁶ *Ibid.*, [103].

otherwise of an alleged Convention right'.⁴⁷ He then proceeded to find that Article 3 (in its domestic conception) *did* provide a right to vote in referendums, which had been violated in the instant case. Supporters of this approach to s.2 have included the original architect of the HRA, Lord Irvine,⁴⁸ Lord Hoffmann⁴⁹ and a number of academics writing on the subject.⁵⁰ It appears then that the 'take into account only', semi-mirror principle, approach is gaining ground over the previous full mirror principle approach.

Existing exceptions under the 'semi-mirror' principle

This principle accepts then that the domestic courts can go beyond Strasbourg but in general cannot depart from the Court's decisions where it has spoken clearly on an issue. However, even that aspect of the principle has been found to admit of some exceptions. While Lewis was able to comment in 2007 that the judicial compulsion towards following the Strasbourg case law was 'practically inescapable' – and that exceptions to the presumption that relevant Convention jurisprudence be applied were more readily found in theory than in practice⁵¹ – the courts' approach to s.2(1) in the intervening years has steadily been modified in order to more readily reflect that discretion apparent in the wording of s.2(1) of the Act. As the grounds on which departure from the nominally-applicable Strasbourg case law become more

⁴⁷ Ibid., [105].

⁴⁸ Lord Irvine, 'A British Interpretation of Convention Rights' [2012] PL 237.

⁴⁹ See: Lord Hoffmann's Judicial Studies lecture, 19 March 2009 (available at: http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf).

⁵⁰ See in particular F. Klug and H. Wildbore 'Follow or lead? The Human Rights Act and the European Court of Human Rights' [2010] EHRLR 621.

⁵¹ J. Lewis, 'The European Ceiling on Rights' [2007] PL 720, 731.

fully articulated by the courts, s.2(1) has become more readily described as a ‘*filter* into the channel by which the Convention rights enter municipal law.’⁵²

The Supreme Court decision in *Pinnock* provides, in summary, clear evidence of this more nuanced approach. In that decision, Lord Neuberger, with whom the eight other Supreme Court Justices agreed, said:

This court is not bound to follow every decision of the European Court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law ... Of course, we should usually follow a clear and constant line of decisions by the European Court ... but we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber ... section 2 of the HRA requires our courts to ‘take into account’ European Court decisions, not necessarily to follow them.⁵³

Although the *Ullah* approach retains some credibility, it can no longer be said to imply an unquestioning acceptance of the Strasbourg line, even where that line is clear. The steady dilution of the ‘mirror principle’ in recent years has seen the grounds on which domestic courts might depart from the Strasbourg line articulated with more confidence and clarity. In

⁵² D. Feldman, ‘The Internationalization of Public Law and its Impact on the UK’ in J. Jowell and D. Oliver (eds), *The Changing Constitution* (7th ed) (Oxford: Oxford University Press, 2011), p.150 (emphasis added).

⁵³ *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 AC 104, [48]. Similarly, *In re McCaughey and another (Northern Ireland Human Rights Commission and others intervening)* [2011] UKSC 20; [2012] 1 AC 725, [93] Baroness Hale said ‘of course, we are not obliged to follow that jurisprudence if there are good reasons to depart from it. We have not so far failed to follow a decision of the Grand Chamber... But the day might come when we would find good reasons to do so’. She did not find good reason to do so in that instance.

Gentle, the House of Lords suggested that departure from the Strasbourg case-law would be legitimate where it is ‘reasonably foreseeable’ that the European Court of Human Rights would come to a different conclusion than that suggested by the available authorities.⁵⁴ In *Re G* the Law Lords found that, where a margin of appreciation would be likely to be afforded by the Strasbourg Court, the question should be regarded as being for domestic authorities to ‘decide for themselves’.⁵⁵ The Supreme Court has also indicated that departure from Strasbourg might be appropriate if the dispute is governed by common law and the court is minded to exercise its discretion to depart from the Strasbourg line,⁵⁶ or if the Strasbourg case-law is outdated,⁵⁷ wrong (‘inconsistent with some fundamental substantive or procedural aspect of our law’),⁵⁸ or badly-informed (‘appear[s] to overlook or misunderstand some argument or point of principle’).⁵⁹

This trend is evident in a number of other decisions: in *Animal Defenders International* the House of Lords determined that it was open to the court to attach ‘great weight’ to a parliamentary (legislative) decision which had determined the balance to be struck between rights and interests in a way which might be interpreted as being inconsistent with Strasbourg authority.⁶⁰ And, as is now well-known, in *R v Horncastle*,⁶¹ in the context of

⁵⁴ *R (on the application of Gentle) v Prime Minister* [2008] UKHL 20; [2008] 1 AC 1356, [53].

⁵⁵ *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 AC 173, [31].

⁵⁶ *Rabone v Pennine Care Foundation NHS Trust* [2012] UKSC 2; [2012] 2 AC 72, [113].

⁵⁷ *R (on the application of Quila) v Secretary of State for the Home Department* [2011] UKSC 48; [2012] 1 AC 621, [43].

⁵⁸ *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 AC 104, [48].

⁵⁹ *Ibid.*

⁶⁰ *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 AC 1312, [33].

⁶¹ [2010] 2 WLR 47. See also: *R v Spear* [2002] UKHL 31; [2003] 1 AC 734.

Article 6, the Supreme Court considered that departure even from clear Strasbourg jurisprudence was exceptionally acceptable under s.2 HRA. The Supreme Court decided that the European Court's prior decision (*Al-Khawaja*)⁶² insufficiently appreciated particular aspects of the domestic process, and determined that in those circumstances it could decline to follow the Strasbourg lead. The domestic provisions in question, the Court found, struck the right balance between the imperative that a trial must be fair and the interests of victims in particular and society in general. The Strasbourg test, it found, did not strike the right balance since it gave a higher value to Article 6 standards than those provisions did, and therefore it was not applied.⁶³

THE CONSERVATIVE PROJECT UNDER A NEW 'SECTION 2(1)'

Conservative opposition to the impact of s.2(1) HRA

Conservative opposition to the HRA centres, as mentioned above, on criticism of a number of Strasbourg decisions, especially certain ones against the UK.⁶⁴ That opposition can clearly find only partial expression by seeking to break the link between the courts and Strasbourg,⁶⁵ and even that stance focuses on *Ullah*-style approaches to s.2(1) which, as discussed, are in the process of being discarded. The reason expressed in the 2014 Conservative document for introducing the BBoR and repealing the HRA is that 'over the past 20 years, there have been significant developments which have undermined public confidence in the human rights framework in the UK.' It finds that the European Court of Human Rights has developed

⁶² (2009) 49 EHRR 1.

⁶³ The European Court subsequently accepted the reasoning of the UK Supreme Court in *Al-Khawaja v United Kingdom* (2012) 54 EHRR 23. See also *Horncastle v United Kingdom* (2015) 60 EHRR 31.

⁶⁴ The most obvious example is *Hirst v United Kingdom (No.2)* (2006) 42 EHRR 41.

⁶⁵ That is because repeal of the HRA would have no impact on UK obligations under Article 46 (discussed below), and Articles 1 and 13 ECHR.

‘mission creep’ on the basis that Strasbourg adopts ‘a principle of interpretation that regards the Convention as a living instrument’.⁶⁶ The problem, from this anti-HRA viewpoint, is partly that the interpretations of the Convention rights at Strasbourg on a number of contentious issues – in particular prisoners’ voting rights, aspects of counter-terrorism law and deportation of non-citizens – are ones that are not assented to by the Westminster Parliament, or in some instances by judges in the House of Lords/Supreme Court,⁶⁷ but which may have effect in UK law⁶⁸ or constrain Parliament.⁶⁹

Although the ‘living instrument’ approach was well-established in the jurisprudence of the Court at the point at which Parliament passed the HRA,⁷⁰ the interpretative approach has been criticised for giving rise to unpredictability, and for exacerbating the effects of the Convention rights, when creative decisions have an unexpected effect in areas of domestic law. In 2009 Dominic Grieve (the then Attorney-General) said that the equivalent of s.2 HRA in a new BBoR should allow or require the domestic courts to take a different stance from Strasbourg in a wider range of circumstances than those then accepted. Grieve argued that the HRA had been ‘interpreted as requiring a degree of deference to Strasbourg that I believe was and should be neither required nor intended’.⁷¹ According to Grieve – and now reflected in the 2014 Conservative document – s.2 should be radically amended since (combined with

⁶⁶ The Conservative Party, *Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws* (October 2014), p.3.

⁶⁷ See the speeches in *Secretary of State for the Home Department v. AF (No.3)* [2009] UKHL 28; [2010] 2 AC 269, especially that of Lord Hoffmann.

⁶⁸ See for example the then Home Secretary’s (Theresa May) speech to the Conservative Party Conference on 4 October 2011 on this point.

⁶⁹ See HC Debates, Vol.551, Cols. 922-923, 24 October 2012 (David Cameron MP).

⁷⁰ See: *Tyrer v United Kingdom* (1979-1980) 2 EHRR 1.

⁷¹ ‘British Bill of Rights Review Imminent, says David Cameron’, *The Guardian*, 16 February 2011.

ss.3 and 6) it has gone far too far in allowing Strasbourg decisions to re-shape domestic law.⁷² Conservative nominee Martin Howe, in his individual paper appended to the Report of the Bill of Rights Commission, took a similar view, arguing that domestic courts should not ‘slavishly follow every twist and turn of the doctrines formulated in the decisions of the Strasbourg Court’.⁷³

From this viewpoint the effects of ss.2 and 3 HRA combined, or of ss.2 and 6, are part of the problem since s.2 can operate in conjunction with ss.3 or 6 to allow a Strasbourg decision, that happens to bear on a matter currently in front of a domestic court, to have legal effect in domestic law, before the executive has had a chance to react to the decision. The executive might well prefer to delay and procrastinate, or to bring forward legislation to Parliament which might represent a more minimal response to the Strasbourg decision than the court-based findings might do. In *AF (No.3)*⁷⁴ – for instance – s.2 was taken to require immediate acceptance into law of the *A v UK* minimum disclosure principle.⁷⁵ *AF* then had the result – unwelcome to the executive in terms of its general implications – of affecting the use of the counter-terror control orders system. Hence the Conservative plan reflected in the 2014 document, and expressed in the 2015 Manifesto, that the s.2 ‘link’ should be broken between the Strasbourg and domestic courts, and ‘the European Court of Human Rights [should] no longer be binding over the UK Supreme Court’.

Methods of ‘breaking the link’ in a British Bill of Rights

⁷² Speech by Dominic Grieve QC MP, *European Convention on Human Rights – current challenges*, Lincoln’s Inn, London, 24 October 2011.

⁷³ Commission on a Bill of Rights, *A UK Bill of Rights? – The Choice Before Us*, Vol. 1 (2012), 218.

⁷⁴ *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28; [2010] 2 AC 269.

⁷⁵ (2009) 49 EHRR 29.

But the method of ‘breaking the link’ is clearly problematic since s.2 HRA on a literal reading requires judges only to take account of Strasbourg rulings, not to give effect to them. The Human Rights Act 1998 (Repeal and Substitution) Bill, introduced in 2012 by Conservative MP Charlie Elphicke,⁷⁶ was withdrawn before its second reading. But it can be taken as affording indications as to the nature of forthcoming Conservative proposals for the BBoR as to a new s.2.⁷⁷ Its clause 2 provides that a court or tribunal determining a question which has arisen in connection with a protected right ‘may’, not ‘must’, ‘take into account a judgment of the ECtHR and/or a judgment of a court in Australia, Canada, New Zealand, the United States of America or any country having a common law-based judicial system, of the European Court of Human Rights; or a court in any other jurisdiction which may be relevant to the UK right under consideration’.

In order to weaken the linkages between domestic decisions and those of the Strasbourg Court under a BBoR – taking account of the Elphicke Bill, the 2014 document, and assuming continued membership of the ECHR system – the instrument might seek to specify the grounds on which the Strasbourg jurisprudence should not be followed. The obvious grounds on which departure from the jurisprudence might be sanctioned have, to varying degrees (as regards grounds 1-8 below), already been acknowledged in the developing jurisprudence under the HRA discussed, and include the following:

1. No relevant Strasbourg jurisprudence can be identified.
2. Relevant Strasbourg jurisprudence is not ‘clear’.
3. Relevant Strasbourg jurisprudence is not ‘constant’.

⁷⁶ Available at <<http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0031/2013031.pdf>>.

⁷⁷ Charlie Elphicke MP was a member of the committee which was working on the Conservative proposals for a Bill of Rights prior to the 2015 General Election.

4. Relevant Strasbourg jurisprudence is ‘out-dated’.
5. Relevant clear and constant Strasbourg jurisprudence is inconsistent with a domestic precedent binding the court in question.
6. Relevant clear and constant Strasbourg jurisprudence against the UK failed to understand a point of domestic law.
7. Relevant clear and constant Strasbourg jurisprudence against the UK failed to take account of factual matters.
8. Relevant clear and constant Strasbourg jurisprudence against the UK failed to take account of an established [or developing] principle of domestic law.
9. Relevant clear and constant Strasbourg jurisprudence against the UK (or another member state) conflicts with jurisprudence from other similar national Supreme Courts.
10. Relevant clear and constant Strasbourg jurisprudence which appears to conflict with Parliament’s legislative intention should be disregarded.

Although a list of permitted exceptions would be both unwieldy and – ironically – limiting of domestic judicial discretion, a BBoR *could* provide that if one or more of these conditions applied, the Strasbourg decision should not be applied in the instant case. Conditions 1-4 are uncontroversial, since they have already received some acceptance, as discussed, from the judiciary under s.2 HRA, although condition 4 would also require that the words ‘whenever made or given’ in s.2(1) HRA, would have to be omitted. Condition 5 is already provided for in the House of Lords decision in *Kay v Lambeth LBC*.⁷⁸ Conditions 6-7 have also already received judicial acceptance under s.2 HRA; they also echo the message to be found in the Joint Concurring Opinion of Judges Casadevall et al in the recent Grand Chamber decision in

⁷⁸ *Kay v Lambeth LBC*; *Leeds CC v Price* [2006] UKHL 10; [2006] 2 AC 465.

Jaloud v the Netherlands.⁷⁹ The courts have come fairly close to the position captured in Condition 8, as discussed above in relation to exceptions to the semi-mirror principle under s.2 HRA. Conditions 9 and 10 would obviously depart from the courts' recent acceptance of the semi-mirror principle discussed, and would require elaboration. Condition 9 would require that conflicting jurisprudence from other similar national Supreme Courts would be treated, if in conflict with Strasbourg, as of more significance in interpreting the BBoR rights than Strasbourg jurisprudence. Otherwise it could be treated as of similar significance. Those two conditions are not necessarily inconsistent with Article 46 ECHR since the state would remain bound to address the case-law in question, if against the UK, and if it represented the 'final' decision.

The anti-mirror principle could also be captured in a BBoR in relation to development of domestic law, *aside* from any exceptions under the new 's.2'. A form of words could be used that echoes s.11 HRA, providing that recourse to common law recognition of rights should occur, even where arguably a Convention right was relevant to the dispute. As Lord Mance said in *Kennedy*: 'the natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on the Convention rights without surveying the wider common law scene.'⁸⁰ A new 's.11' could further provide that if the relevant common law right could be developed to cover the dispute in question recourse to the ECHR jurisprudence could be deemed unnecessary. That would accord with conditions 7 and 9 above; this possibility is considered further below.

Consequences of 'breaking the link' through repeal of the HRA

Protection for rights under the British Bill of Rights

⁷⁹ *Jaloud v Netherlands* (2015) 60 EHRR 29.

⁸⁰ *Kennedy v Information Commissioner* [2014] UKSC 20; [2015] AC 455, [46].

The attempt to diminish the domestic impact of the Strasbourg jurisprudence is not – at first glance – reflected in the 2014 Conservative proposals as to the list of rights to appear in the BBoR; it is to ‘[p]ut the text of the original Human Rights Convention into primary legislation.’ The document proceeds: ‘[t]here is nothing wrong with that original document, which contains a sensible mix of checks and balances alongside the rights it sets out, and is a laudable statement of the principles for a modern democratic nation. We will not introduce new basic rights through this reform; our aim is to restore common sense, and to tackle the misuse of the rights contained in the Convention’. So it appears that the aim of seeking to weaken the ties to Strasbourg via a BBoR is not to be realised via changes to the core listed rights (a position also reflected in the Bill of Rights Commission’s terms of reference).

However, an activist approach to the rights listed in the BBoR might be stifled by the inclusion of limitation clauses. The 2014 Conservative document proposes to (emphasis added):

Clarify the Convention rights, to reflect a proper balance between rights and responsibilities. This will ensure that they are applied in accordance with the original intentions for the Convention and the mainstream understanding of these rights. We will *set out a clearer test* in how some of the inalienable rights apply to cases of deportation and other removal of persons from the United Kingdom. [...] The Convention recognises that people have civic responsibilities, and allows some of its rights to be restricted to uphold the rights and interests of other people. Our new Bill *will clarify these limitations* on individual rights in certain circumstances.

This appears to imply that the link between Strasbourg and the domestic courts would be further weakened due to express provisions in the text of the BBoR other than the wording of

a new 's.2', taking the form of limitation, 'interpretation' or re-balancing clauses which could create exceptions going beyond those expressly present in the ECHR. Such provisions, it appears, could affect equivalents of Articles 2 and 3 ECHR, and would be likely to apply to equivalents of Articles 5 and 6. Articles 8-11 ECHR already contain exceptions based on a broad range of societal interests if the interference is necessary and proportionate, but the proposal would include creating broader exceptions to the BBoR version of Article 8 (as has occurred already in the Immigration Act 2014),⁸¹ or provision to disapply it in the circumstances envisaged. A domestic court would have to decide on the precise meaning of an 'interpretation' clause in the BBoR in relation to the facts of a case before it, before it could determine whether or not it could take account of the Strasbourg jurisprudence in the affected area. Change to the s.2 equivalent in the BBoR would also have an impact on a new 's3'. If s.2 HRA appeared in radically changed form in a new BBoR, the judges would still have to interpret provisions of statutes in relation to the listed rights in the BBoR, but without a guide from the Strasbourg jurisprudence might, in the more sensitive areas of executive action, do so in ways that failed fully to call the executive to account, as discussed further below.

The inclusion of limitation clauses would obviously be most controversial in respect of the non-materially qualified rights which appear likely to be expressed in language in the BBoR similar to that used in the ECHR. Under the Strasbourg jurisprudence the scope for placing limitations on the Article 6(1) standards to be applied is very limited: leaving a derogation aside, it can occur only on a 'strictly necessary' basis where national security demands it (or certain other pressing interests) so long as the hearing overall is fair.⁸² Very limited departures from full adherence to certain aspects of a fair hearing, including full

⁸¹ In s.19.

⁸² *A v United Kingdom* (2009) 49 EHRR 29.

disclosure of the material on which suspicion is based, or equality of arms, may be permissible, provided that these are strictly necessary to protect other vital interests, such as the safety of witnesses or national security.⁸³

Article 5, however, does not allow for deprivations of liberty outside the permitted exceptions, even for the most pressing national security reasons, without a derogation. But a re-balancing clause in a new BBoR could enable an overt limitation of the ambit of an Article 5(1) equivalent to be created, meaning, for example, that liberty-invading executive measures on the control orders model (strengthened TPIMs under the Counter-terrorism Act 2015 Part Two or enhanced TPIMs⁸⁴ – as the replacement preventive measure for control orders) could be used with less concern that a deprivation of liberty under Article 5 might be found to arise. A re-balancing clause might appear to be of value in the sense of offering the government greater freedom of action to introduce or continue executive measures of detention in relation to terrorist suspects who cannot be deported or – it is claimed – prosecuted. But obviously challenges at Strasbourg would then arise.

Most controversially, the ability of the judiciary to reflect expansive Strasbourg interpretations of the rights listed in the BBoR could also be stifled by rendering Strasbourg decisions advisory only in terms of binding the state. The 2014 Conservative plan proposed that ‘every judgement that UK law is incompatible with the Convention will be treated as advisory and we will introduce a new Parliamentary procedure to formally consider the judgement. It will only be binding in UK law if Parliament agrees that it should be enacted as

⁸³ See *Rowe v United Kingdom* (2000) 30 EHRR 1, [61]; *Botmeh and Alami v United Kingdom* (2008) 46 EHRR 31, [37]; *Van Mechelen v The Netherlands* (1997) 25 EHRR 647, [58].

⁸⁴ Under the Enhanced Terrorism Prevention and Investigation Measures Bill 2012 which has not yet been passed into law.

such'.⁸⁵ Most obviously, decisions relating to prisoners' voting rights,⁸⁶ deportation of foreign criminals,⁸⁷ and sex offenders⁸⁸ would be likely prompts for such a step. If that aspect of the proposals was taken forward in a BBoR, then it would presumably also have an impact on the judges' stance under the new 's.2', since they would probably be reluctant to absorb a Strasbourg decision against the UK into domestic law via the BBoR if that decision was one that Parliament had decided not to adhere to. In any event, the new 's.2' would be likely to direct the judges not to take account even of settled Strasbourg jurisprudence that contradicted the intentions of Parliament.

Obviously that aspect of the plan would run contrary Article 46 ECHR, which provides that states agree to adhere to final judgments against themselves. Under the Conservative proposals, Parliament would have the key responsibility for protecting the ECHR rights. However, the document does not explain how the aim of treating the Strasbourg Court as an advisory body only, allowing open defiance of Strasbourg decisions in legislation, could be reconciled with Article 46 or with the UK's continued adherence to the ECHR; it is also highly unlikely that any negotiation via the Council of Europe could allow for such a change.⁸⁹ This aspect of the proposals appears – if seriously pursued – to represent

⁸⁵ The Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* (October 2014), p.14.

⁸⁶ This issue continues to be of significance: *Greens and M.T. v United Kingdom* (2011) 53 EHRR 21; *Millbank and others v United Kingdom* (44473/14), 9 July 2016.

⁸⁷ For instance: *Secretary of State for the Home Department v Respondent* [2010] UKUT B1 Upper Tribunal (Immigration and Asylum Chamber) Appeal Number: IA/13542/2009.

⁸⁸ See: *R (on the application of F) v Secretary of State for the Home Department* [2010] UKSC 17; [2011] 1 AC 331.

⁸⁹ The Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* (October 2014), p.8.

the first steps on the way to withdrawal from the Convention. Theresa May openly canvassed for withdrawal from the Convention in the run-up to the ‘Brexit’ referendum,⁹⁰ and – even though she subsequently indicated that such a step would not command widespread support and would accordingly not be pursued – reports have continued to speculate that taking the UK out of the Convention system remains a mid-term (post-Brexit) objective.⁹¹

Reconciling enhanced flexibility with the benefits of Strasbourg oversight

Re-evaluation of the linkage between domestic courts and the European Court of Human Rights provides an opportunity to consider the implications of introducing a BBoR, partly or mainly to escape from the unpredictable impact of the Strasbourg ‘living instrument’ approach. As discussed, the new ‘s.2’ would be likely to indicate that the courts could take account of domestic constitutional values, and possibly decisions of other Supreme Courts, according such sources a weight at least equal to that of Strasbourg decisions. That would appear to mean that the Supreme Court would be enabled in the BBoR to go beyond Strasbourg – as it has recently accepted that it is able to do under s.2 HRA.⁹² As discussed above, domestic judges have already found that their determinations as to the scope of rights need not be curtailed by the particular point that Strasbourg has reached, or by the operation of the margin of appreciation doctrine; rather, in a number of instances the judges have struck out on their own in a determination to create expansive interpretations of Convention rights, creating rights in areas not clearly apparent in the ECHR jurisprudence, and in the process

⁹⁰ ‘UK must leave the European Convention on Human Rights, says Theresa May’, *The Guardian*, 25 April 2016.

⁹¹ ‘Theresa May to fight 2020 election on plans to take Britain out of the European Convention on Human Rights after Brexit is completed’, *The Telegraph*, 28 December 2016.

⁹² See text to n.41 above, et seq.

creating a more domestically-attuned, creative and imaginative domestic human rights' jurisprudence.

So it would appear to be the case that if, for example, the new BBoR 's.2' enjoined the judges not to accord the Strasbourg jurisprudence any higher status than domestic constitutional principles, a more creative and expansive rights-based jurisprudence *could* arise under the BBoR. But possibly such creativity in practice would be likely to arise only in the less politically difficult areas of human rights law, judging by the record of the judges under the HRA. For example, in the cases of *Re G*⁹³ and of *Campbell*⁹⁴ the House of Lords gave a more expansive interpretation to Article 8 than Strasbourg at the point in question had done. *Campbell* found that Article 8 ECHR applied via the courts' obligation under s.6 HRA in adjudicating on an existing common law action in relation to a private body, a newspaper, which had invaded the privacy of Naomi Campbell (indirect horizontal effect). Such a finding was not supported explicitly by Strasbourg jurisprudence at that point in time.⁹⁵ *Re G* concerned the question whether an unmarried couple should be subjected to an absolute bar to adoption in favour of married couples. The House of Lords found that the ban created discrimination on grounds of marital status in relation to Article 8, even though no Strasbourg decision had clearly established that marital status was a protected ground of discrimination under Article 14. Somewhat similarly, in *Rabone v Pennine Care NHS Trust*⁹⁶ the Supreme

⁹³ *G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 AC 173.

⁹⁴ *Campbell v Mirror Group Newspapers* [2004] UKHL 22; [2004] 2 AC 457.

⁹⁵ It was established shortly after *Campbell: Von Hannover v Germany* (2005) 40 EHRR 1.

⁹⁶ *Rabone v Pennine Care NHS Trust* [2012] UKSC 2; [2012] 2 AC 72, [112]. That stance was affirmed by Baroness Hale in *R (Keyu and others) v Secretary of State for Foreign and Commonwealth Affairs and another* [2016] UKSC 69; [2016] AC 1355, [291]: 'We do not have to wait until a case reaches Strasbourg before deciding what the answer should be. We have to do our best to work it out for ourselves as a matter of principle.'

Court found unanimously that the state owes an operational duty under Article 2 ECHR to a hospital patient who is mentally ill but who is not formally detained under the Mental Health Act. That stance was taken even though the Strasbourg jurisprudence did not demonstrate clearly that such a duty existed.

In *R (Limbuela) v Secretary of State for the Home Department*, which concerned the politically sensitive matter of asylum-seeking,⁹⁷ the court found that the ‘only approximately relevant authority’⁹⁸ at the Strasbourg level was the admissibility decision in *O’Rourke v United Kingdom*.⁹⁹ The treatment, by the European Court of Human Rights, of the relevant law in *O’Rourke* runs to a mere four paragraphs; yet on the basis of that slight authority the House of Lords was able not only to fashion a remedy, but to extend the scope of the protection arguably offered by Article 3 of the Convention in the domestic context in so doing.¹⁰⁰ The same can be said of *EM (Lebanon)*¹⁰¹ which was viewed as so controversial that its effects were reined in via legislation (at least, that is one of the intentions underlying the Immigration Act 2014 s.19).

But in the even more sensitive areas of national security and crime control the domestic judges have been ‘corrected’ at Strasbourg in the HRA era,¹⁰² which supports the argument that the judges should remain anchored to Strasbourg via s.2, and the semi-mirror principle, because on the whole Strasbourg shows a greater determination to uphold human

⁹⁷ [2005] UKHL 66; [2006] 1 AC 396.

⁹⁸ C. Warbrick, ‘The European Convention on Human Rights and the Human Rights Act: the view from the outside’ in H. Fenwick, G. Phillipson and R. Masterman, *Judicial Reasoning under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2007), p.48.

⁹⁹ *O’Rourke v United Kingdom* (2001) ECtHR No.39022/97.

¹⁰⁰ J. Lewis, ‘The European Ceiling on Rights’ [2007] PL 720, 736.

¹⁰¹ *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64; [2009] 1 AC 1198.

¹⁰² Eg *Othman v United Kingdom* (2012) 55 EHRR 1.

rights standards against legislative and executive encroachment. Thus *Gillan v UK*¹⁰³ departed from the very restrained interpretation of Article 8 adopted domestically in *R (on the application of Gillan) v Commissioner of Police for the Metropolis*.¹⁰⁴ *A v UK*¹⁰⁵ upheld a higher due process standard than the previous House of Lords' decision in *Secretary of State for the Home Department v MB*¹⁰⁶ had done in relation to Article 6. As mentioned, *A v UK* was then absorbed directly into domestic law via ss.2 and 3 HRA in *AF (No.3)*.¹⁰⁷ In *R (S) v Chief Constable of the South Yorkshire Police* and *R (Marper) v Chief Constable of the South Yorkshire Police*¹⁰⁸ the claimants sought judicial review of the retention by the police of their fingerprints and DNA samples on the grounds inter alia that the practice was incompatible with Article 8 ECHR. The majority of the House of Lords held that the retention constituted an interference with the claimants' Article 8 rights, but they unanimously held that any interference was justified under Article 8(2). The European Court of Human Rights disagreed in *S and Marper v United Kingdom*.¹⁰⁹ Similarly, the Strasbourg judgment in the *Qatada* case (*Othman v UK*)¹¹⁰ departed from the House of Lords' findings¹¹¹ in that instance as regards Article 6 (but agreed with the Court of Appeal ones),¹¹² taking a more expansive view of the Article 6 requirements.

¹⁰³ (2010) 50 EHRR 45.

¹⁰⁴ [2006] UKHL 12; [2006] 2 AC 307.

¹⁰⁵ (2009) 49 EHRR 29.

¹⁰⁶ [2007] UKHL 46; [2008] 1 AC 440.

¹⁰⁷ *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28; [2010] 2 AC 269.

¹⁰⁸ [2004] UKHL 39; [2004] 1 WLR 2196.

¹⁰⁹ (2008) 48 EHRR 1169.

¹¹⁰ (2012) 55 EHRR 1.

¹¹¹ *Othman v Secretary of State for the Home Department* [2009] UKHL 10; [2010] 2 AC 110, in which it was found that *Qatada* could be deported.

¹¹² *Othman v Secretary of State for the Home Department* [2008] EWCA Civ 290; [2008] 3 WLR 798.

Clearly, whatever the Conservative leadership meant by ‘breaking the link’ to Strasbourg, it did not mean that the full mirror principle should be captured in the BBoR ‘s.2’, but, ironically, if the BBoR is *not* intended by the Conservative leadership to foster a more expansive and creative domestic human rights’ jurisprudence, which appears to be the case, it could be argued that the BBoR should *strengthen*, not weaken, the link to Strasbourg. Certain of the decisions considered, such as *Campbell* and *EM (Lebanon)*, might support that conclusion. In other words, from the Conservative perspective, a new ‘s.2’ should be used to rein in the Supreme Court rather than Strasbourg, by tying it more firmly to certain less creative and expansive aspects of the Strasbourg jurisprudence. On the other hand, the Strasbourg decisions in the area of national security, ‘correcting’ the national courts, would obviously suggest that government would be less likely to be called to account in that area, and might acquire greater freedom of action, at least until a challenge at Strasbourg, if the Supreme Court had greater leeway under ‘s.2’ to disregard the Strasbourg jurisprudence. These two opposing possible consequences of ‘breaking the link’ with Strasbourg are thrown into starker relief and pursued further in the next section, which considers complete decoupling of the domestic courts from Strasbourg.

Full de-coupling of domestic courts from Strasbourg?

De-coupling of the courts from Strasbourg could be taken to mean adhering in ‘s.2’ BBoR to a version of the anti-mirror principle to the effect that the courts could refuse to follow Strasbourg, even where clear and constant jurisprudence was apparent, where the Supreme Court disagreed with that jurisprudence. But a ruling of the Supreme Court clearly or probably contrary to clear and constant Strasbourg jurisprudence might well lead to a successful application to Strasbourg, which would mean that the BBoR had failed to allow rights to be vindicated domestically. That would mean that delay would be incurred while an

application proceeded to Strasbourg, leaving domestic human rights' breaches to subsist for significant periods. The eventual Strasbourg ruling could be reacted to by the executive and /or Parliament, depending on any provision in the BBoR providing for that eventuality, which in particular might address the question whether the status of the judgment could be diminished.

However, such de-coupling *could* also be deemed to be advantageous in terms of rights-protection at the present time, although that is obviously not likely to form part of the future Conservative defence of the new 's.2'. Such a proposition might appear counter-intuitive at first glance, especially taking account of the jurisprudence in the area of national security considered above. The Strasbourg Court's jurisprudence has been in effect world-leading and has quite dramatically enhanced rights' protection in a range of contexts in the UK.¹¹³ The influence of its previous jurisprudence at the international level and via the HRA has already embedded itself in judicial rights-based thinking and will certainly in that sense influence decisions under the BBoR. But it is arguable that the European Court has recently shown a tendency, perhaps in anticipation of what was likely to occur at the Brighton High Level conference in 2012, and what might occur in future, to seek to appease member states, and the UK in particular, by handing down less confrontational judgments.¹¹⁴ The Coalition Government, as mentioned above, attempted to rein in the Court, no doubt partly as a result of the *A v UK* and *Qatada* judgments, at the Brighton Conference in 2012,¹¹⁵ although the

¹¹³ In addition to those 'corrective' decisions mentioned above, see also: *Tyrer v United Kingdom* (1979-1980) 2 EHRR 1; *Ireland v United Kingdom* (1979-1980) 2 EHRR 25; *Sunday Times v United Kingdom* (1979-1980) 2 EHRR 245; *Dudgeon v United Kingdom* (1982) 4 EHRR 149.

¹¹⁴ Eg *Babar Ahmed and others v United Kingdom* (2402/07, 11949/08, 36742/08, 66811/09 and 67354/09) and also refusal (25 September 2012) of leave to appeal to Grand Chamber.

¹¹⁵ See The Brighton Declaration (2012), available at:

http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.

declaration that actually emerged, originally intended by David Cameron to create strongly enhanced subsidiarity, was not on the whole radical.¹¹⁶

Redolent of a somewhat more appeasement-oriented approach, it appears that, currently the ‘living instrument’ approach of the Strasbourg Court is coming under pressure, especially in the counter-terror context, as states attempt to address violent manifestations of Wahabism/Salafism¹¹⁷ and seek to head off responses from the extreme right to such manifestations. In the more sensitive areas of rights’ interpretation Strasbourg is currently showing a tendency to abandon the ‘living instrument’ approach.¹¹⁸ And attempts to mollify intense criticisms of the Strasbourg regime in the UK are arguably visible in the recent decisions not to award compensation to prisoners deprived of voting rights¹¹⁹ and the Grand Chamber finding that whole life sentences are Article 3 compliant.¹²⁰ With a view to its own future, and to the project of maintaining a *degree* of rights’ protection, in a range of arenas, the European Court may therefore be relying on a notion of enhanced subsidiarity, placing stronger emphasis on the margin of appreciation doctrine, heavily influenced by the

¹¹⁶ On which, see Protocol 15 to the ECHR and, for commentary, M. Elliott, ‘After Brighton: Between a Rock and a Hard Place’ [2012] PL 619, 621.

¹¹⁷ In *Othman v United Kingdom* (2012) 55 EHRR 1 the Court found that deportation with assurances against Article 3 treatment was permissible; see also *Babar Ahmed and others v United Kingdom* (n.114 above).

¹¹⁸ See: H. Fenwick ‘Enhanced subsidiarity and a dialogic approach or appeasement in recent cases on Criminal Justice, Public Order and Counter-terrorism at Strasbourg against the UK’ in K. Ziegler, E. Wicks, L. Hodson (eds), *The European Court of Human Rights and the UK – A Strained Relationship* (Oxford: Hart Publishing, 2016).

¹¹⁹ *Millbank and Others v The United Kingdom* (44473/14), 9 July 2016; *Firth and Others v United Kingdom* (2016) 63 EHRR 25.

¹²⁰ *Hutchinson v United Kingdom* (57592/08), 17 January 2017.

‘European common standards’ approach,¹²¹ as appeasement devices to obscure the possibility that in some contexts it is preserving only a minimum rights’ standards.

The Court is also currently attempting to maintain its own authority, which is coming increasingly under threat as certain states appear to be repudiating ‘Western’ human rights’ standards.¹²² In seeking to do so the Court has increasingly turned to relying on discerning a common European standard; if no such standard can be discerned, or if such a standard is only nascent, it will accord a wide margin of appreciation to the member state in question. The result is a tendency to avoid confrontations with member states on sensitive and culturally-specific issues.¹²³ This tendency is evident in the social context where there are very clear divergences of view in the member states, especially as to homosexual rights. Partly as a result of its ‘common European consensus’ approach, certain decisions at Strasbourg as to protection for same sex unions under Article 8 exemplify this tendency towards appeasement, in particular the decision in *Oliari v Italy*,¹²⁴ in which the Court declared the claim to a right to same sex marriage to be inadmissible. While *Oliari* did recognise a right to a same sex registered partnership under Article 8, its recognition was hedged around with various conditions which would be unlikely to be fulfilled in a number of

¹²¹ See K. Dzehtsiarou ‘Does consensus matter? Legitimacy of European consensus in the case law of the European Court of Human Rights’ (2011) PL 534, 537. See further: K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge: Cambridge University Press, 2016).

¹²² See eg: Human Rights Watch ‘Azerbaijan: Government Repression Tarnishes Chairmanship’ 29 September 2014 (<https://www.hrw.org/news/2014/09/29/azerbaijan-government-repression-tarnishes-chairmanship>); M. Smirnova, ‘Russian Constitutional Court affirms Russian Constitution’s Supremacy over ECtHR decisions’ *UK Const. L. Blog*, 17 July 2015.

¹²³ See in particular *A, B, C v Ireland* (2011) 53 EHRR 13.

¹²⁴ (2015) 40 BHRC 549.

Central or Eastern European countries, possibly for many years.¹²⁵ The Court took account in relation to Italy of discordance between social reality and the law, and the coherence of the administrative and legal practices within the domestic system, in assessing the applicable positive obligations. Such a discordance would be unlikely to be discerned in, for example, Turkey, Slovakia or Russia, where it would be much harder for a same sex partnership to live openly as a couple, and where a much higher percentage of the population are opposed to recognition of same sex unions than in Italy. It appeared that the Court was seeking to preserve the very fragile consensus across Europe that exists in relation to the ECHR. *Oliari* and the decision in *Schalk and Kopf v Austria*¹²⁶ could be compared in this respect with acceptance of same sex marriage in *Obergefell v Hodges*¹²⁷ in the US Supreme Court, or with *Von Hannover (No.3)* which, it is argued, down-graded the significance of privacy¹²⁸ as compared to the stance taken in *Campbell* in the House of Lords.¹²⁹

It may be argued then that as far as Western democracies are concerned, on a range of issues the Court's stance is no longer that of a leader in ensuring rights' protection. If the Supreme Court was in effect enjoined in a BBoR to become the guardian of the rights enshrined in the BBoR, that would appear to accord it the authority and legitimacy the Law Lords appeared to seek when they decided in *Ullah* to anchor themselves to the Strasbourg jurisprudence. The result might be that the rights-based jurisprudence of the Supreme Court was enriched under the BBoR rather than undermined, bearing in mind the influence on the jurisprudence of the 'appeasement devices' of the Court just mentioned. Thus it is concluded

¹²⁵ H. Fenwick, 'Same sex unions at the Strasbourg Court in a divided Europe: driving forward reform or protecting the Court's authority via consensus analysis?' [2016] EHRLR 249.

¹²⁶ (2011) 53 EHRR 20.

¹²⁷ 576 US (2015).

¹²⁸ (8772/10), 19 September 2013; see also *Von Hannover (No.2)* (2012) 55 EHRR 15.

¹²⁹ [2004] UKHL 22; [2004] 2 AC 457.

that non-importation of an equivalent to s.2 in the BBoR could cautiously be welcomed. Lord Wilson's stance, for example, in *Moohan* gives substance to the argument that the Supreme Court under a BBoR might continue to be prepared to develop a more creative domestic human rights jurisprudence if partially de-coupled from Strasbourg. Further, if the new 's.2' more fully decoupled the courts from Strasbourg then, where Strasbourg has spoken in a manner that limits the scope of a right, as the majority in *Moohan* found it had done (clearly) in relation to the scope of Article 3, the Supreme Court could decide to disregard that limitation and create a more expansive version of the right domestically, as a number of the judges in the minority were prepared to consider doing in *Moohan*.¹³⁰

However, while de-coupling from Strasbourg might appear to have the potential to free the domestic courts to self-generate expansive and comprehensive municipal protections for human rights, it should also be observed that so doing would be in tension with much of the insular, parochial tenor of Conservative politicians' statements on human rights.¹³¹ Thus, clearly, the question would be how far such statements had an influence on the wording of a new 's.2' and thereafter on the stance of the Supreme Court under the BBoR. A new 's.2' in the BBoR might not – even if a Conservative-dominated House of Commons passes such an instrument – be able to create a strait-jacket precluding activist interpretations of the rights. But if unequivocal wording was used, subordinating, as far as the judges were concerned, settled jurisprudence at Strasbourg to legislative determinations, a diminution in rights protection in the UK would tend to follow.

¹³⁰ [2014] UKSC 67; [2015] AC 901.

¹³¹ On which see: C. Gearty, *On Fantasy Island: Britain, Europe and Human Rights* (Oxford: Oxford University Press, 2016).

Further, while the UK is found to be in breach of the requirements of the Convention relatively infrequently,¹³² a number of the cases referenced above illustrate that the European Court of Human Rights continues to play a significant corrective role, highlighting those occasions on which the national authorities in the UK have fallen below what it gauges to be the required pan-European minimum standard. It should not simply be assumed that domestic institutions, liberated from the perceived constraints of the Strasbourg case-law, would necessarily produce domesticated alternatives of comparable – or greater – force. However, the force of that objection would depend on the extent to which the more recent ‘appeasement’-based Strasbourg approach continues to influence decisions, and on the willingness of the domestic judges – and the capacity of domestic law – to produce such alternatives.¹³³ It would be counter-intuitive to suggest that recent evidence of ‘going beyond’ Strasbourg, would be retracted if, in considering the scope of a particular instance of rights protection, judges did not need to begin by assessing the clarity or otherwise of the relevant Strasbourg jurisprudence. Nevertheless, the possibility cannot be ruled out that instances might arise in the more sensitive areas affected by the ECHR, including police powers and national security, as in *A v UK* in relation to Article 6, in which the corrective role of Strasbourg was pivotal.

¹³² Of the 14 judgments issued in 2014 to which the UK was a party, a violation was found in 4 cases (28.5%). By comparison, of 129 cases involving the Russian Federation a violation was found in 122 (94.5%) and of the 87 decisions to which Romania was a party, breaches of the Convention were found in 74 (85.0%). More long-standing members of the Convention system were also seen to evidence high rates of violation during 2014: of 19 cases involving Belgium, a violation was found in 16 (84.2%), while of 22 cases involving France, violations were found in 17 (77.2%).

¹³³ To date, for instance, the UK Supreme Court has declined to find that proportionality provides a free-standing head of judicial review at common law (*Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591).

Re-enter the Common Law?

In parallel with the judicial development of an interpretation of the requirements of s.2(1) which admits of greater flexibility in the translation of Strasbourg jurisprudence into domestic law, the UK Supreme Court has also pointed towards the further development of a distinctly national source of rights protection, reiterating – in a series of recent decisions – the potential utility of the common law as a tool of rights protection.¹³⁴ Observing the tendency – prompted by the HRA – for courts and advocates to treat the Convention case-law as both the beginning and end of an enquiry into a potential infringement of rights, the Supreme Court has sought to reaffirm the rights-protecting qualities of the common law. Appealing to the doctrine of subsidiarity, the Supreme Court has argued that the HRA did not necessarily ‘supersede the protection of human rights under the common law or statute, or create a discrete body of law based upon judgments of the European court.’¹³⁵ The domestic law is therefore in the process of being re-emphasised as ‘the natural starting point’ for analysis of a rights question, with the Supreme Court cautioning against focusing exclusively on the Convention rights.¹³⁶ Were this tendency to become more marked after repeal of the HRA, it might render any tinkering with the wording of a new ‘s.2’ in a BBoR irrelevant.

In the face of political antagonism towards the Convention and the European Court of Human Rights, the recent judicial embrace of common law principles can be interpreted as an attempt to emphasise the existing, and distinctly national, capacity of the courts to uphold individual rights. As Lady Hale found in *Moohan* ‘if we are confronted with a question which

¹³⁴ For discussion see: R. Masterman and S. Wheatle, ‘A Common Law Resurgence in Rights Protection?’ [2015] EHRLR 57.

¹³⁵ *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115, [57].

¹³⁶ *Kennedy v Information Commissioner* [2014] UKSC 20; [2015] AC 455, [46].

has not yet arisen in the European Court [of Human Rights], we have to work out the answer for ourselves, taking into account, not only the principles which have been developed in Strasbourg, but also the principles of our own law and constitution'.¹³⁷ However, the potential of the common law as a tool of rights' protection should not be overstated; it is (at the current stage of its development) powerless to resist a clear and unequivocal legislative encroachment into rights.¹³⁸ It is also notable that its pre-HRA standard of judicial review of administrative discretion – even at the 'anxious scrutiny' end of the *Wednesbury* scale – was found to be lacking by the European Court.¹³⁹ Although the potential for rights' questions to be resolved by recourse to the common law should not be ignored, nor should the potential for the Convention to require adherence to a more exacting standard:

... although the Convention and our domestic law give expression to common values, the balance between those values, when they conflict, may not always be struck in the same place under the Convention as it might once have been under our domestic law. In that event, effect must be given to the Convention rights in accordance with the Human Rights Act.¹⁴⁰

¹³⁷ Ibid., [54].

¹³⁸ *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 131. Though differing assessments of the clarity of statutory language can underpin radically differing versions of statutory interpretation (on which see: *R (on the application of Evans) v Attorney-General* [2015] UKSC 21; [2015] AC 1787).

¹³⁹ *Smith and Grady v United Kingdom* (2000) 29 EHRR 493, [138].

¹⁴⁰ *A v British Broadcasting Corporation* [2014] UKSC 25; [2015] AC 588, [57].

The limitations of the common law in terms of creating rights' protection were emphasised by Lord Hodge in *Moohan* in finding that there is no common law right of universal and equal suffrage that could override the legislative position:

It is not appropriate for the courts to develop the common law in order to supplement or override the statutory rules which determine our democratic franchise. In *In re McKerr*,¹⁴¹ Lord Nicholls of Birkenhead stated [...]: 'The courts have always been slow to develop the common law by entering, or re-entering, a field regulated by legislation. Rightly so, because otherwise there would inevitably be the prospect of the common law shaping powers and duties and provisions inconsistent with those prescribed by Parliament.'¹⁴²

While the resurgence of common law rights-based reasoning has sought to re-emphasise that national law – absent the influence of the Convention jurisprudence – has the ability to offer protections for individual rights, the Supreme Court has openly acknowledged that the standards of protection offered may very well differ. Nor – as *Moohan* indicates – should it be assumed that the common law would necessarily expand to fill the jurisprudential space currently occupied by the Strasbourg case-law as its growth may be inhibited by statute. Even if – as Lord Hodge indicated in *Moohan* – the common law maintains a reserve power to declare unlawful primary legislation which 'abusively' undermined democracy and the

¹⁴¹ [2004] 1 WLR 807.

¹⁴² *Moohan v Lord Advocate* [2014] UKSC 67; [2015] AC 901, [34]. Lord Kerr, however, found, [87]: 'It is therefore at least arguable that exclusion of all prisoners from the right to vote is incompatible with the common law'.

rule of law¹⁴³ – the traditional subordination of judge-made law to statute, lack of a defined catalogue of rights, and uncertain remedial capacity, ensures that it lacks the weaponry to offer as robust, and comprehensive, a level of protection as that potentially afforded by the Strasbourg Court and HRA jurisprudence. Without considerable judicial impetus (which in the face of a clear legislative statement would also surely be decried as unwarranted activism), it will continue to fail to do so for the foreseeable future.

CONCLUSIONS

The growing evidence of ‘exceptions’ to the semi-mirror principle reflects the pragmatic acceptance that the Strasbourg jurisprudence does not provide determinative authority for every arising human rights dispute,¹⁴⁴ that an uncritical stance towards the European Court’s case-law effectively inhibits dialogue initiated by national courts¹⁴⁵ and it is likely to be symptomatic of a judicial response to the political disquiet surrounding the disempowerment of national institutions supposedly prompted by the enactment of the HRA.¹⁴⁶ In the light of these domestic jurisprudential developments, political rhetoric concerning the subordination of domestic institutions to the Strasbourg court represents a (deliberately?) simplified account. Placing instead a stronger emphasis on the ability of domestic judges to depart from Strasbourg could aid in maintaining the idea that the HRA was never intended to disturb national sovereignty by subjecting domestic institutions to the overwhelming influence of the

¹⁴³ *Moohan v Lord Advocate* [2014] UKSC 67; [2015] 2 WLR 141, [35]. See also: *R (on the application of Jackson) v Attorney-General* [2005] UKHL 56; [2006] 1 AC 262, [102] (Lord Steyn) and [159] (Baroness Hale). Cf. Lord Neuberger, ‘Who are the masters now?’ Lord Alexander of Weeton Lecture, 6 April 2011.

¹⁴⁴ *Ambrose v Harris* [2011] UKSC 3; [2011] 1 WLR 2435, [129].

¹⁴⁵ See: *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 AC 104, [48].

¹⁴⁶ R. Masterman and S. Wheatle, ‘A Common Law Resurgence in Rights Protection?’ [2015] EHRLR 57, 61-63.

Strasbourg case-law. It is fairly clear why it is the case that de-emphasising s.2's current ability to place curbs on Parliament's decisions might appear to neuter Conservative objections to the HRA which largely rest on anger at its ability to facilitate European interference with such decisions.

In principle, the introduction of a BBoR – even to supporters of the HRA – could be regarded as being unobjectionable. Further, the notion that the domestic judges should not be constrained by Strasbourg, evident in *Re G* and in *Moohan*, has long held appeal. But to use a BBoR as a method of escaping the impact of the Convention, rather than as a domestic means of seeking to ensure that recourse to Strasbourg to vindicate rights is unnecessary, is a clearly retrograde step, opposing the notion on the international stage, that the UK's human rights' record is one that is overall to be respected.

The proposals may partly amount to political rhetoric, intended to appease various elements in the party and avert the UKIP threat. Their precise realisation in practice is clearly problematic at present, given the Conservatives' currently slim majority. Repeal of the HRA and introduction of a BBoR would bring about some change in the relationship between the domestic courts and Strasbourg, as discussed, and affect methods of protecting human rights in Britain, but they would be unlikely to be of the order of magnitude that the 2015 Manifesto and the 2014 document suggest. For example, the Supreme Court could develop and apply a principle of proportionality as an aspect of unreasonableness,¹⁴⁷ regardless of Strasbourg interpretations of the ECHR rights. If the Convention rights were to be captured in the BBoR it is unlikely in any event that the Supreme Court could literally disregard Strasbourg interpretations of the rights, and previous domestic jurisprudence absorbing those interpretations would presumably stand.

¹⁴⁷ See *Kennedy v the Charity Commission* [2014] UKSC 20; [2015] AC 455 on this point.

The domestic judiciary and the Strasbourg Court appear to be moving towards a position in which the main Conservative objections to the impact of s.2 are being, to an extent, neutered. While the recent enhanced emphasis on subsidiarity at Strasbourg could be utilised, as it has been above in exploring – or toying with – this possibility, to support an argument for the de-coupling of the domestic courts from Strasbourg, it would, it is argued, fail to support that argument if the mirror principle was largely discarded, as advocated in *Moohan*. The partial de-coupling of the domestic courts from Strasbourg that has already occurred, combined with the dialogic approach evident in the *Horncastle* saga, takes much of the force from the Conservative argument for espousing a BBoR mainly to escape from an over-activist Strasbourg approach.

Thus, if the Conservative objection is mainly to the ‘living instrument’ approach taken by the Court to the ECHR, then, as this article has argued, there are two bases for contending that the concern is being over-emphasised.¹⁴⁸ As discussed, the domestic courts appear to be in retreat from *Ullah*, and appear to be entering a new phase of post-HRA domestic reasoning in which the Court’s jurisprudence may provide an aid to guide the interpretation of the rights, but not necessarily to perform a more prescriptive role. Further, the Strasbourg Court itself appears to be in retreat, to an extent, from its living instrument approach: its most creative phase may now be over, and in the face of an increasingly nationalistic mood among a number of member states it may view its own survival and continued adherence at least to basic ECHR standards as paramount. Thus, it is concluded that the project of using the BBoR to break the link between the courts and Strasbourg owes

¹⁴⁸ That may be deliberate in some quarters – the prisoners’ voting rights saga may have been utilised in some parts of the media and in the Conservative party as a convenient peg on which to hang general hostility to the ECHR.

more to opposition to the Court's decisions than to an expectation of effecting real changes in rights protection in the UK.